COLUMBIA PCS INCORPORATED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

August 19, 1994

BY MESSENGER

Mr. William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

RE: Gen. Docket No. 93-252

Dear Mr. Caton:

Columbia PCS, Inc. ("Columbia PCS"), pursuant to comments 47 C.F.R. Sec. 1.415 and 1.419, Columbia PCS, Inc., hereby submits the attached reply comments.

Please direct any inquiries concerning this matter to the undersigned.

Sincerely,

Jill Foehrkolb
Director of Legal Affairs

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Implementation of Section 3(n) and 332 of the Communications Act Regulatory Treatment of Mobile Services	)))	GN Docket No. 93-252

Reply Comments of Columbia PCS, Inc.

I. SUMMARY

Virtually all commenters in this proceeding, with the exception of Columbia PCS, Inc. ("Columbia PCS"), argue that permissible management contracts, resale agreements and joint marketing relationships should not be considered attributable interests under the FCC's CMRS ownership rules. In contrast, Columbia PCS provided the FCC a possible framework for more clearly defining the standard for permissible management contracts, but argued that even if a management contract was found to meet this standard, it should nonetheless be deemed attributable.

Upon reflection and based upon the obvious confusion and lack of consensus among industry participants, we believe the Commission should instead focus on a workable bright line test for determining which management contracts should be permitted without resulting in an improper transfer of control. The Commission should narrowly define permissible management contracts to include only "sub-contracting"

agreements for any specific functional task (e.g., construction), but not any general management/general contractor, strategy or planning functions.

II. LACK OF CONSENSUS EXISTS AS TO DEFINITION OF A MANAGEMENT CONTRACT

As reflected in the numerous comments received in this proceeding, there is significant confusion and lack of consensus as to what constitutes a management contract and the application of the existing Intermountain Microwave test for de facto control as applied to so-called management contracts. For example, Motorola states that "management contracts . . . come in a variety of permutations, each with a separate delineation of powers and responsibilities."[1] Motorola goes on to offer various examples of arrangements all of which it classifies as management contracts -- an arrangement "to provide a source of consultation, advice and experience to inexperienced licensees;" an arrangement "to supplement and expand a [licensee's] knowledge of the Commission's rules;" and an arrangement "to assist operations owned by [licensees] who seek expert advice with regard to the operation of their systems."[2] While each of these arrangements contemplates less than the hiring of an entity to perform a "general contractor" role in the operations of a system, all of these arrangements are lumped together under the generic heading of "management contracts."

Dial Page and AMTA characterize as management contracts not only "arrangements [used] to supplement their own technical and marketing capabilities when necessary" but also full "system management.[3]

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1 Comments of Motorola Inc. at 6.

2 Id. at 6-7.

3 Comments of Dial Page, Inc. at 7; Comments of AMTA at 9.

These commenters (as well as others) view permissible management contracts as allowing a third party to step in and essentially run all aspects of a licensee's operations. Nextel describes permissible management contracts for SMR operations to include a "contract with an experienced operator to run the system" along with "an option to purchase the station in the future under defined circumstances."[4]

Dial Page adds that, "in certain instances, licensees manage their own systems when they were geographically proximate, but entered into management relationships for facilities farther away."[5] Other parties view as permissible management contracts arrangements where compensation is tied to a licensee's equity or revenues, thus creating relationships where the manager begins to look essentially like an owner of the operations. For example, PCC provided a series of requirements for a safe harbor provision for management contracts which included "bona fide financing arrangements and fixed fee or percentage of revenue management contracts" (emphasis added) as allowable under the proposed safe harbor![6]

III. PERMISSIBLE MANAGEMENT CONTRACTS MUST BE CLEARLY DEFINED PRIOR TO AUCTIONS

GTE states that, "although the Commission discusses management agreements as a group, their provisions in fact widely differ."[7] CTIA warns: "As the FCC knows from experience, determinations of de facto control pursuant to Intermountain and its progeny consume considerable Commission resources, and can take years to resolve."[8]

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4 Comments of Nextel Communications, Inc. at 3.
5 Comments of Dial Page, Inc. at 7.
6 Comments of PCC Management Corp. at f.n. 10.
7 Comments of GTE 7.
8 Comments of the CTIA at 8.

Additional confusion arises from the fact that the Commission's existing standards for permissible management contracts for private radio licensees differ significantly from those in place for common carriers.[9] And further, recent decisions by the Court of Appeals for the District of Columbia reviewing the FCC's application of the Intermountain Microwave test to certain management contracts contested by TDS demonstrate the existing test is extremely difficult to apply in a consistent manner given its multiple factors and the variety of types of management contracts possible.[10] Columbia PCS thus recommends that a brighter line is needed to augment determinations of when a management contract goes "too far" and results in a transfer of de facto control to a party other than the licensee. Such a test would thus provide greater regulatory certainty in this troubled area.

Several parties in the proceeding provided suggestions for setting guidelines for permissible management contracts. For example, Motorola states that, under a permissible management contract, the "central operational, policy and employment decisions remain exclusively the province of the licensee."[11] Pacific Bell Mobile Services offers a rule that "management contracts are limited in duration."[12]

While these suggestions are appropriate and helpful, Columbia PCS continues to believe that the Commission should establish a bright line test for permissible management contracts based upon whether a third party manager is a "subcontractor" for specific, non-control function(s) (e.g., construction, system design, marketing, customer

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9 See Private Radio Bureau Guidelines, 64 RR 2d 840 (1988); Common Carrier Bureau Guidelines CL-93-141 (1993).

10 See, e.g., Telephone and Data Systems, Inc. v. FCC, 19 F.3d 42 (D.C. Cir. 1994).

11 Comments of Motorola Inc. at 7.

12 Comments of Pacific Bell Mobile Services at 4.

service, etc.). Conversely, if the third party manager is a general contractor with responsibilities of the operation and integration of a complete system, including control-type functions, this arrangement would be deemed an impermissible transfer of control of the license.

Additionally, any subcontractor arrangements should reflect fair market value of the relationship based upon arm's length negotiations. Any contractual ties to the licensee's revenues, profits and/or equity should not be allowed. Finally, for purposes of the broadband PCS auctions, the FCC should require (1) audited independent reports at the time of the long form application certifying the "subcontractor" status of the relationship of any such management contracts entered into by a prospective PCS licensee, and (2) disclosure at the time of short-form applications.

If the FCC establishes this bright-line test for permissible management contracts, then Columbia PCS would support excluding such subcontracting arrangements from being treated as an attributable interest for purposes of the Commission's various CMRS ownership rules.

IV. RESALE AND JOINT MARKETING AGREEMENTS

As the filed comments demonstrate, joint marketing agreements and resale arrangements are better understood and less controversial than management contracts. Columbia PCS agrees with the National Cellular Resellers Association that "the Commission must also ensure that resale restrictions which would permit exclusive access to discrete portions of CMRS spectrum under exclusive resale arrangements are

prohibited in all classes of CMRS service."[13] With the adoption of this type of rule, it would be unnecessary to treat resale arrangements as attributable. Similarly, most parties in the record agree that joint marketing arrangements should be reviewed under general antitrust standards. Thus, a specific attribution rule is unnecessary in these situations as well.

V. SUMMARY

The Commission has created an enormous opportunity for increased competition from designated entities by establishing entrepreneurial bands in the broadband PCS proceedings. However, without a clearer definition for permissible management contracts between passive investors and designated entities, this opportunity is clearly threatened. Arguably under the Commission's PCS rules as written, a passive investor in a designated entity could have a long-term management contract for the operations and general management of that entity's system with payments tied to revenues and/or profits of the licensee. However, such a scenario would be a blatant subversion of the policies of Congress and the Commission, even though arguably complying technically with the Commission's existing rules. Unless the FCC tightens this obvious loophole, it will have opened a Pandora's box and will be embroiled in years of litigation regarding alleged sham operations.

In this proceeding, Columbia PCS has tried to provide the Commission with a workable bright-line test for determining when management contracts are permissible. This test would allow subcontractor arrangements with third parties, including passive

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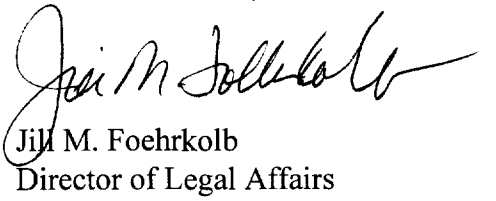
[13] Comments of National Cellular Resellers Association at 7-8.

investors, so long as these arrangements do not rise to the level of a "general contractor" role for the manager, reflect fair market value, are the result of arm's length negotiations, and involve no other contractual ties to the licensee's revenues, equity and/or profits.

Respectfully submitted,

COLUMBIA PCS, INC.



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